

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000723-001 DT

11/14/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

PHOENIX NEWSPAPERS INC

DAVID JEREMY BODNEY

v.

TEMPE UNION HIGH SCHOOL DISTRICT NO 213 (001) GORDON LEWIS
TEMPE UNION HIGH SCHOOL DISTRICT
GOVERNING BOARD (001)

MINUTE ENTRY

This court has received Petitioner's Motion for Leave to File Notice of Legislative History, and good cause appearing,

IT IS ORDERED granting the motion.

This Court has jurisdiction over special actions pursuant to the Arizona Constitution Article VI, Section 18, and Rule 4, Arizona Rules of Procedure for Special Actions.

This matter has been under advisement and I have considered and reviewed the exhibits made of record and the excellent memoranda and oral arguments submitted by counsel. The only issue presented in this special action proceeding is whether the performance evaluation and disciplinary records of the Tempe Union High School Superintendent are public records that must be disclosed without exception and exemption.

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(1) Jurisdiction.

Acceptance of special action jurisdiction is highly discretionary.¹ Jurisdiction is generally accepted only in those cases in which "justice cannot be satisfactorily obtained by other means,"² and may be assumed to correct plain and obvious errors.³ Rule 3 of the Arizona Rules of Procedure for Special Actions states:

The only questions that may be raised in a special action are:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

Jurisdiction will be exercised in this case as the Petitioner has no other remedy for a clear violation of the Arizona Public Records Law.⁴ Moreover, the issues raised involve significant issues of public interest and concern.

(2) Facts and Procedural History.

The facts in this case are not in dispute. A mother of a student in the Tempe Union High School District (hereinafter the "District") obtained an order of protection from the Chandler Justice Court, on May 22, 2003, against the District's Superintendent, James D. Buchanan (hereinafter the "Superintendent"). The mother alleged threats and harassment by the Superintendent. Petitioner, Phoenix Newspapers, INC, alleges that these events occurred as a result of an extramarital affair the Superintendent had with the mother. Petitioner is Arizona-based newspaper that wants the District to produce performance evaluation and disciplinary records of the Superintendent. Petitioner requested production of these records pursuant to the

¹ *Pompa v. Superior Court In and For the County of Maricopa*, 187 Ariz. 531, 931 P.2d 431, 235 Ariz. Adv. Rep. 27 (App. 1997); *State ex rel. McDougall v. Superior Court*, 172 Ariz. 153, 155, 835 P.2d 485, 487 (App.1992).

² *King v. Superior Court*, 138 Ariz. 147, 149, 673 P.2d 787, 789 (1983); see also *Harris Trust Bank of Ariz. v. Superior Court*, 188 Ariz. 159, 162, 933 P.2d 1227, 1230 (App.1996).

³ *Amos v. Bowen*, 143 Ariz. 324, 326, 693 P.2d 979, 981 (App. 1984); *State ex rel. Collins v. Superior Court of State of Arizona*, 129 Ariz. 156, 629 P.2d 992 (1981).

⁴ A.R.S. §§39-121 to 39-121.03

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Arizona Public Records Law⁵ on May 27, 2003, but the District denied access to these records on June 5, 2003, asserting that the records were protected under the Family Educational Right to Privacy Act. Petitioner repeated its request, but it was again denied by the District.

(3) Issue Presented and the Relevant Law.

The only issue before this court is whether the performance evaluation and disciplinary records of the Superintendent are public records within the meaning of A.R.S. §39-121(b), that must be disclosed without exception or exemption. That statute provides:

All officers and public bodies shall maintain all records, including records as defined in § 41-1350, reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from the state or any political subdivision of the state.

A.R.S. §41-1350 states in relevant part:

Definition of records. In this chapter, unless the context otherwise requires, "records" means all books, papers, maps, photographs or other documentary materials, regardless of physical form or characteristics, including prints or copies of such items produced or reproduced on film or electronic media pursuant to § 41-1348, made or received by any governmental agency in pursuance of law or in connection with the transaction of public business and preserved or appropriate for preservation by the agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the government, or because of the informational and historical value of data contained therein.

[emphasis added]

Generally, the proper way to view all requests for information is not to determine whether a record is *technically* a public record or other matter, but instead to determine whether the release of the information would have an important and harmful effect on the official duties of the official or agency.⁶ If the effect would not be harmful, the information should be made available to the public and "doubts should be resolved in favor of disclosure."⁷ This approach is improper when, as in this case, the facts raise a substantial question as to the threshold determination of whether the document is subject to the public records statute.⁸ To determine

⁵ Id.

⁶ *Church of Scientology v. City of Phoenix Police Dept.*, 122 Ariz. 338, 594 P.2d 1034 (App. 1979).

⁷ Op. Atty. Gen. No. R75-781, p. 141, 1975-76, p. 50, 1976-77.

⁸ *Salt River Pima-Maricopa Indian Community v. Rogers*, 168 Ariz. 531, 536, 815 P.2d 900, 905, 19 Media

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whether document is subject to disclosure, a court is required to make initial determination of whether document is public record or other matter before deciding whether its release would have a harmful effect on the duties of an official or agency.⁹

To be a “public record” a document must have some relation to the official duties of the public officer.¹⁰ In this case, determining whether the performance evaluation and disciplinary records of the Superintendent are related to his duties will be quite simple. The District Policy Manual – Qualifications of the Superintendent states (in relevant part):

The Superintendent shall:

- **Be of good moral character and of unquestionable morals and integrity.**

[emphasis added]

Interestingly, this is the first duty listed for superintendents. The Tempe Union High School District Governing Board must evaluate the Superintendent once a year and evaluate him concerning this duty. The Superintendent’s evaluation and disciplinary records are, therefore, public records, for they relate to his official duties.

A.R.S. §15-537(G), as cited by the Respondents, addresses the disclosure of a *teacher’s* evaluations. A.R.S. §15-537(G) states:

Copies of the assessment and evaluation report of a certificated teacher retained by the governing board are confidential, do not constitute a public record and shall not be released or shown to any person except:

1. To the certificated teacher who may make any use of it.
2. To authorized district officers and employees for all personnel matters regarding employment and contracts and for any hearing which relates to personnel matters.
3. For introduction in evidence or discovery in any court action between the governing board and the certificated teacher in which either:
 - (a) The competency of the teacher is at issue.
 - (b) The assessment and evaluation were an exhibit at a hearing, the result of which is challenged.[emphasis added]

L. Rep. 1914 (1991).

⁹ *Id.*

¹⁰ *Id.* at 537, P.2d at 906.

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While A.R.S. §15-537(G) precludes the disclosure of a teacher's evaluation records, A.R.S. §15-503, which governs performance evaluations for school superintendents, not does contain a similar prohibition against public disclosure or refer to such evaluations as confidential.

As Petitioner correctly argues, in January 1999, the Arizona Legislature attempted to add the following text to A.R.S. §15-503(C):

Copies of the assessment and evaluation report relating to a school administrator...are confidential and do not constitute a public record.¹¹

Both houses passed the bill, but it was subsequently vetoed by then-Governor, Jane Hull, on April 21, 1999. Governor Hull explained her veto:

[T]his bill was vetoed because I believe parents have a right to know. School districts supported with taxpayer dollars should not withhold any information from the public.

Recent events in various school districts and charter schools make it clear that our task is to insure parents have complete access to information; only then can parents make the best decisions on behalf of their children.

My administration stands for openness in government no mater how unpleasant. A veto of this bill reinforces our commitment to full public disclosure.¹²
[emphasis added]

Now this court must determine whether the release of the information would have an important and harmful effect on the official duties of the official.¹³ To release evidence that the Superintendent threatened and harassed a woman, whose child attended the Superintendent's school district, to the point that the woman had to obtain an order of protection, could have a harmful personal effect on the Superintendent's performance of his official duties. But, that harmful effect does not extend to the District. Rather, it would demonstrate that the Tempe Union High School District Governing Board was fulfilling its duty to conduct evaluations of such school officials. If this information were to be published by Petitioner, it would have a tendency to show that the Superintendent may not be of good moral character and of unquestionable morals and integrity, if the allegations were true. If the Superintendent is not fulfilling his most important duty, the people living within the school district have a right to

¹¹ State of Arizona Senate Bill 1119 – Forty-fourth Legislature – 1999.

¹² 6 Ariz. Leg. Serv. 1999, 44th Leg., Veto Messages at A-9.

¹³ *Church of Scientology*, 122 Ariz. 338, 594 P.2d 1034.

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know this information. This court concludes that the public's right to know the contested information outweighs the potentially harmful effect and embarrassment upon the Superintendent.

(4) Conclusion.

This court concludes that the District erred in refusing to disclose public records it was required by law to disclose. The Superintendent's performance evaluation and disciplinary records are public records not protected or entitled to confidentiality under Arizona law.

IT IS ORDERED granting the relief sought by Petitioner.

IT IS FURTHER ORDERED that counsel for the Petitioner shall lodge an order consistent with this opinion and its application for attorneys' fees and costs no later than December 17, 2003.